(3)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 297

THE ARUNDEL CORPORATION,
Petitioner,

vs.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

WILLIAM S. HAMMERS,
Counsel for Petitioner.

INDEX

Subject Index

Table of Cases Cited

Statutes Cited

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 297

THE ARUNDEL CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Arundel Corporation, by William S. Hammers, its counsel, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on May 7, 1945.

Opinions Below

The opinions of the Court of Claims (R. 58-64) are not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered on May 7, 1945 (R. 64). The jurisdiction of this Court is in-

voked under Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. part 2, 752.

Contract Provision Involved

There is involved in this case the meaning and application of the following provision in the standard form of Government construction contract:

> "Article 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions."

Questions Presented

1. Whether Article 4 of the standard form of government construction contract (herein covering an underwater dredging project) obligates the United States to make an equitable adjustment of the contract to provide for the increase of cost of performing the work where, unknown to either of the parties at the time the contract was entered into and signed, there existed at the site subsurface conditions materially differing from those shown on the draw-

ings and indicated in the specifications with respect to the quantity of pay yardage excavation on which the bids were solicited and the contract price based.

2. Whether the subsurface conditions, referred to and contemplated by the first part of Article 4 of the contract, comprehend only differences in the character of the materials or structures necessitating substantial variation and change in the plans and specifications, or include other physical conditions such as a material difference in quantity from that indicated on the contract drawings and stated in the specifications.

3. Whether Article 4 of the contract obligates the United States to compensate the contractor for the increase of cost of performing the work required where it is represented in the specifications that the proposed work is not exposed to storm action and a substantial change in the physical conditions from those shown on the drawings and indicated in the specifications is caused by a hurricane.

4. Whether that part of Article 4 of the contract which refers to the encountering, or discovery, during the progress of the work, of "unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," contemplates only unknown subsurface conditions existing at the time the plans and specifications were prepared, or embraces other contingencies of unusual nature which change the physical conditions materially from those shown on the plans or indicated in the specifications.

5. Whether the United States is liable in damages to petitioner for its failure and refusal to modify the contract unit price pursuant to the covenant in Article 4 of

the agreement to provide for the increase of cost resulting from the changed conditions encountered.

Statement

This is a suit arising under and growing out of a unit price contract between petitioner and respondent for dredging in the Cape Cod Canal, Massachusetts.

Petitioner seeks to recover $34,550.88, the increase in cost of performing the work due to the fact that the subsurface conditions encountered were found to be grossly in variance with the plans and specifications on which bids were solicited and the contract price based.

The action is predicated on the failure and refusal of the contracting officer and head of the department to modify the contract unit price pursuant to the covenant in Article 4 of the agreement, said article being hereinabove set out.

The special findings of fact by the Court of Claims (R. 41-58) present a complete history of the claim.

On August 4, 1938, the War Department, through the United States Engineer Office at Boston, Massachusetts, issued specifications for certain dredging to be done in the Cape Cod Canal, and invited the submission of sealed bids, to be opened August 24, 1938, for performing the work.

The work to be done was shown on drawings described in paragraph 1-03 of the specifications, and was divided into two separate areas designated as Section A and Section B.

The work in Section A, which is the area herein involved, consisted of dredging on the north side of the Canal to a depth of 32 feet below mean low water over a bottom width of 100 feet from Station 110 to Station 375, a distance of about 26,500 feet. The work in Section B consisted of dredging on the south side of the Canal to the same depth and between the same stations as Section A over a bottom width of 65 feet.

The specifications stated that, owing to the rapid currents, the material in the dredged cuts is eroded when it is disturbed by the process of dredging; that during the progress of recent contracts the prescribed cuts had been secured by the contractor after the dredging of about 75 per cent of the estimated quantity of material in the cut, scow measurement, including overdepth; and that the quantities given therein as the total estimated quantities of material necessary to be removed from within the specified limits were not the actual quantities lying therein but the *estimated pay yardages,* and were the quantities that would be used as a basis for canvassing bids and for determining the amount of the consideration of the contract (R. 44-45).

The total estimated quantity of material necessary to be removed within the specified limits of Section A was stated to be 2,423,000 cubic yards, scow measurement, the maximum amount of allowable overdepth dredging 471,500 cubic yards, scow measurement, and the two amounts totaling 2,894,500 cubic yards, scow measurement, the basis for bids (R. 43-44).

Petitioner's bid for the work in Section A was 34.73 cents per cubic yard, scow measurement. It was the low bid. However, after the bids were opened on August 24, 1938, the district engineer at Boston took the position that the bid was excessive in comparison with the Government estimate of cost which was 30.9 cents per cubic yard, and after some negotiations between the parties the district engineer offered to award the contract to petitioner at 34 cents per cubic yard, to which petitioner replied on September 10, 1938, as follows: "Confirming telephone conversations, we will accept the award of contract covering the performance of 2,894,500 cubic yards of material, scow measurement, to be removed from Section A * * * at a unit price of

Thirty-four cents ($0.34) per cubic yard, scow measurement * * * (R. 42).

On the basis above stated, a contract for the work was entered into and signed by the parties on October 6, 1938 (R. 43).

Petitioner commenced operations at Station 368 near the westerly or Buzzards Bay end of the project on November 29, 1938, and completed the work on June 12, 1940 (R. 43, 54).

In October and November 1938 respondent caused certain predredging surveys to be made in the area to be dredged under the contract. Upon completion of said surveys, respondent estimated that the material to be dredged under the contract would be 2,468,550 cubic yards instead of 2,894,500 yards, pay yardage, as set out in the specifications, a reduction of 425,950 cubic yards, and found that the greatest reduction occurred at the easterly or Cape Cod Bay end of the project between stations 110 and 190 where it amounted to approximately 317,000 cubic yards. The new computations were completed and tabulated during December 1938 and were furnished to petitioner in the early part of January 1939 (R. 49-50).

The surveys on which the specifications and contract drawings were based had been made about June 1938 (R. 66).

The change in phyiscal conditions from those shown on the contract drawings and indicated in the specifications was attributed to a hurricane that occurred along the New England coast on September 21, 1938, about two weeks before the contract was entered into on October 6, 1938. It was found that the unusually strong currents created by the hurricane (10 to 12 miles per hour as compared with the maximum velocity of the normal tidal currents of 4 miles per hour) had removed a substantial amount of material from the area to be dredged, as above indicated, al-

though neither party was aware of the change in conditions at the time the contract was entered into, nor until after the new surveys mentioned had been made and the dredging operations started (R. 45).

The specifications stated that "The proposed work is located within the land section of the Cape Cod Canal and is not exposed to storm action (R. 22).

Upon receipt of the information in regard to the changed conditions, petitioner on January 16, 1939, requested that respondent modify the contract, pursuant to Article 4 thereof, and increase the unit price to provide for the increase of cost of performing the work (R. 50).

Petitioner asked that the unit price be increased from 34 cents to 35.96 cents per cubic yard for all pay yardage dredged under the contract (R. 55). The method employed by petitioner in determining its estimated unit cost is, in general, the same as that employed by respondent in computing the estimated cost of a given job (R. 55).

It was stated in support of the request for a modification of the unit price that the loss of the more easily dredgeable material between stations 110 and 190, lowering of bank necessitating 30% greater dredge advance per scow load of dredging, and increased average distance to the dumping ground would cause a drop in rate of production equivalent to a 3.5% reduced output for the entire job (R. 51).

The request was denied, the basic reason assigned therefor being that no provision is made in the contract by which a reduction in yardage affords the contractor grounds for claiming an increase in the contract price (R. 53).

Upon completion of the work, this suit was instituted in the Court of Claims. In the petition, petitioner asked for recovery of $39,565.60 based upon the above mentioned increase in unit price of 1.96 cents per cubic yard as applied to a total of 2,018,653 cubic yards of material dredged and removed. In the evidence offered in support of the

claim, petitioner revised its original estimated increase in unit price from 1.96 cents to 1.73 cents per cubic yard, based on the actual wind-up details of the job, and the amount sought to be recovered to $34,550.88, based upon an application of the 1.73 cents per yard to 1,997,161 cubic yards, the total number of cubic yards for which payment was received under the contract (R. 55).

The court below found that the average estimated monthly rate of production as computed by petitioner in its original job estimate was 133,000 cubic yards, and in carrying out the work the average monthly rate of production was 127,950 cubic yards, a reduction of 3.8% (R. 57). It also found that, on the basis that had the actual yardage and the time required for its removal been known when the bid was submitted, a higher bid, 35.73 cents per cubic yard, would have been submitted; and that an application of the increase in bid price of 1.73 cents per cubic yard to the total yardage removed and paid for, namely, 1,997,161 cubic yards, makes an amount of $34,550.88, the amount of recovery herein sought (R. 57).

The court below concluded, however, as a matter of law, one judge writing a dissenting opinion, that petitioner was not entitled to recover and dismissed the petition entering judgment accordingly.

Specification of Errors to Be Urged

The Court of Claims erred:

1. In holding that respondent, by the contract, only bound itself to make an equitable adjustment of the contract price if materials, structures, or obstacles of a substantially different *character* from those described in the specifications were encountered.

2. In holding that the subsurface or latent conditions materially differing from those shown or indicated in the con-

tract, referred to and contemplated by the first part of Article 4 of the contract, were subsurface or hidden conditions which actually existed but were unknown by either party at the time the specifications and drawings were prepared and at the time the bid was submitted and accepted, and because of which unknown conditions the representation or indication in the plans and specifications would have to be substantially varied or changed in order for respondent to obtain the completed work as called for and intended by the contract.

3. In holding that the second part of Article 4 of the contract contemplated only unknown *subsurface* conditions of an unusual nature and differing materially from those ordinarily encountered and generally recognized as inhering in the character of work called for, even though no representation had been made or indication given with reference thereto in the specifications or on the drawings.

4. In failing to hold that the changed conditions caused by the hurricane of September 21, 1938, were unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, such as contemplated by Article 4 of the contract, calling for an equitable adjustment of the contract unit price.

5. In not holding that petitioner was entitled to damages by reason of the failure of the respondent to modify the contract unit price pursuant to the covenant in Article 4 of the contract.

6. In failing to render judgment in favor of petitioner in the sum of $34,550.88.

7. In holding that petitioner was not entitled to recover, and dismissing the petition.

Reasons for Granting the Writ

Petitioner respectfully represents, as reasons for the granting of the writ, that the Court of Claims has decided important questions of Federal law which have not been, but should be, settled by this Honorable Court; that the questions involved are of great public interest affecting thousands of contractors; that said questions have been decided in a way probably in conflict with applicable decisions of this Court; and that said Court, in determining the questions, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of this Court.

It is a matter of common knowledge that the Government annually enters into a vast number of contracts using the standard form in which is incorporated Article 4, above quoted, relative to "Changed conditions," and this Court, in *United States* v. *Callahan Walker Construction Co.*, 317 U. S. 56, recognized the necessity for an authoritative determination of the meaning and application of the terms of said form of contract by taking under consideration and reviewing a decision of the Court of Claims involving articles 3 and 15 thereof.

The conflict of views in the opinions delivered in this case serves to emphasize the necessity and desirability of an authoritative determination of the meaning and application of the covenant contained in the aforesaid Article 4 of the standard form of contract here involved.

It was stated by the Court of Claims in the case of *Hirsch* v. *United States*, 94 C. Cls. 602, that one of the purposes of article 4 was to relieve bidders of the necessity of having to increase their bid prices so as to take care of all possible unknown and unforeseen conditions and contingencies that might arise in connection with furnishing respondent a perfect job at their own expense; and Judge Madden, in

the dissenting opinion in this case, says the purpose of the article is to induce bidders not to increase their bids because of fear of unknown impediments to profitable performance. And this Court, in *United States* v. *Rice*, 317 U. S. 61, referring to articles 3 and 4 of the standard form of contract, stated that both clauses deal with changes made necessary by new plans or new discoveries made subsequent to the signing of the contract. It is important, therefore, to the Government as well as to the petitioner and others interested in government contract work that the questions of law herein involved be authoritatively decided by this Honorable Court.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

WILLIAM S. HAMMERS,
Counsel for Petitioner,
505 Union Trust Bldg.,
Washington, D. C.

INDEX

CITATIONS

665507—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 297

THE ARUNDEL CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (R. 58–62, 62–64) have not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 7, 1945 (R. 64). The petition for a writ of certiorari was filed on August 4, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether a dredging contractor, whose contract called for a stated sum per cubic yard, can

recover judgment in the Court of Claims despite its failure to show that the alleged breach of contract by the Government materially affected the unit cost or the monthly progress of the dredging work.

2. Whether a dredging contractor with the Government, under a specific duty by the terms of its contract to complete the dredging project without regard to initial estimates of the quantity, is entitled to an adjustment of the contract unit price pursuant to the provisions of Article 4 relating to changed conditions, solely by virtue of a reduction in the quantity of material to be dredged caused by heavy tidal scour, after the acceptance of the bid.

CONTRACT PROVISIONS AND SPECIFICATIONS INVOLVED

The pertinent contract and specifications involved herein are set out in the Appendix, *infra* pp. 14–17.

STATEMENT

On August 4, 1938, the United States advertised for bids, to be opened on August 24, 1938, for dredging work in the Cape Cod Canal (R. 41). The portion of the project here involved, Section A, consisted of dredging the north side of the canal, the distance being divided into subsections running from Station 110+00 to Station 375+00 (R. 41, 44). The specifications which accompanied the above-mentioned advertisement stated that the quantity to be excavated in Section A was 2,894,-

500 cubic yards (R. 42).[1] The bidding contractor was put on notice that the United States gave no warranty as to quantity of material to be dredged (R. 46), and was advised that the entire quantity of material necessary to complete the project would have to be excavated, whether such quantity was more or less than such estimated amounts (R. 44). Possibility of erosion by reason of tide scouring was noted (R. 45).[2]

Petitioner, at 34.73 cents per cubic yard, was low bidder on the Section A project (R. 42). This bid being considered excessive by the Government engineers,[3] negotiations with petitioner resulted in a compromise figure of 34 cents per cubic yard, on which basis a contract was entered into on or about September 10, 1938 (R. 42, 49). The formal contract was executed on October 6, 1938, work to begin within 30 calendar days of notice to petitioner to proceed (R. 43). Pursuant to notice, petitioner's dredging operations began on November 29, 1938, and were completed on June 12, 1940 (R. 43).

---

[1] This estimated quantity was composed of 2,423,000 cubic yards of material necessary to be removed plus 471,500 cubic yards maximum allowable overdepth dredging (R. 44), determined by Government surveys in June and July, 1938 (R. 47–48).

[2] The specifications which accompanied the invitation to bid became part of the contract (R. 41, 19–20, 23, 33–34).

[3] The Government estimate of cost for Section A was 30.9 cents per cubic yard (R. 42).

A hurricane, which occurred on September 21, 1938, set up unusually strong tides along the New England coast and scoured out a substantial quantity of material from the Section A area, amounting to approximately 425,950 cubic yards, with the greatest amount of change (approximately 317,000 cubic yards) taking place at the easterly end of the project between Stations 110 and 190 (R. 49–50). Neither petitioner nor the United States was aware of the effect of the hurricane tides on the project until the customary Government predredging survey was made in October and November, 1938 (R. 49).

Petitioner, upon being advised of the result of the survey in January, 1939, requested a contract price adjustment or the grant of compensating yardage (R. 49–50). On January 17, 1939, the Government asked petitioner to furnish details in support of the requested price increase (R. 50). Thereafter, by letter of March 6, 1939, petitioner stated that the material scoured was of the more easily dredgeable type and that most of the scouring had occurred between Stations 110 and 190, the area of estimated maximum production due to character of material and short tow to the disposal area (R. 50).

The price increase requested was 1.96 cents per cubic yard (R. 50). Upon receipt of petitioner's letter of March 6, 1939, the Government again requested facts and figures which would support

the requested contract price adjustment (R. 50). Thereafter, on May 19, 1939, petitioner advised the contracting officer that its request for a unit price increase was made under the changed-condition provisions of paragraph 4–01 of the specifications [4] and was based entirely on "reduced production between stations 110 and 190," a "changed condition due to an act of God * * *" (R. 51). Some estimate of the anticipated effect of the change accompanied petitioner's letter of May 19, 1939.

The contracting officer denied petitioner's request for an increase in price (R. 52). The denial noted that no dredging between Stations 110 and 190 had yet been performed by petitioner and that the requested price increase appeared to be based on anticipated events (R. 52). Further, the contracting officer ruled that the quantity of dredging set forth in the specifications was given solely as an approximation; that no warranty had been made by the Government that such quantity would actually be found within the dredging limits; and that the specific duty had been assumed by the contractor, as required by the specifications, to complete the project whether the quan-

[4] By paragraph 4–01 of the specifications, the price adjustment procedure of Article 4 was made applicable if, in the opinion of the contracting officer, "materials, structures, or obstacles of a substantially different *character*" were encountered (R. 46, 50–51; Appendix, *infra*, pp. 14–15, 16–17). [Italics supplied.]

tity of dredging be more or less than the estimated yardage (R. 52–53). The contracting officer pointed out that notice had been given in the specifications that a reduction in quantity by reason of scour was to be expected, and noted that no showing of fact in support of the alleged increase in operating cost could be made until work in the subsection involved (Stations 110 to 190) had been performed (R. 53).

In accordance with the standard dispute procedure contained in Article 15 of the contract (R. 47; Appendix, *infra*, pp. 14–15), petitioner appealed to the Chief of Engineers from the decision of the contracting officer (R. 53).[5] The Chief of Engineers ruled that no changed condition, warranting additional compensation, within the meaning of Article 4 of the contract or paragraph 4–01 of its specifications was presented. He found that no difference of character within the meaning of these contract provisions existed by reason of the reduction of yardage. As to any contention that a difference in quantity brought the situation within Article 4 or paragraph 4–01, he pointed to the specific denial by the Government of responsibility for quantity estimates and

[5] By paragraph 1–13 of the contract specifications, the Chief of Engineers was designated as the duly authorized representative of the head of the department concerned to decide disputes in accordance with the provisions of Article 15 of the contract (R. 47).

the duty placed on the contractor to complete the work, regardless of estimated quantity (R. 54).

The decision of the Chief of Engineers on petitioner's appeal was rendered on October 17, 1939 (R. 54). As of that date, substantially no dredging operations had been performed in the subsection here involved (R. 54). The work in the subsection was performed principally in October, November, and December, 1939, and January 1940 (R. 54).

On March 24, 1942, petitioner instituted this suit in the Court of Claims, alleging that the reduction of yardage caused by hurricane tide scour constituted "subsurface conditions materially differing from those shown on the contract drawings or indicated in the specifications" within the meaning of Article 4 of the contract, and prayed damages in the amount of $39,565.60 (R. 4, 6).[6]

After finding the facts as set forth above, the court below found that petitioner had failed satisfactorily to establish that the reduction in dredging yardage due to the hurricane had materially affected petitioner's monthly progress or its unit cost in carrying out the project (R. 58).[7] The

[6] This amount was reduced by petitioner to $34,550.88 in connection with the schedule introduced by it in the court below to support its claimed increase in unit price (R. 57).

[7] The court below, in findings 16–21 (R. 55–57), discussed a schedule offered in evidence by petitioner in support of its request for an increase in unit price. This schedule did not

court below further found that a variation between estimated and actual monthly dredging ranging from 3 to 10 percent was reasonable in the Cape Cod Canal; and that petitioner's actual monthly dredging was 3.8 percent lower than its estimated monthly dredging for the entire Schedule A project, 8.6 percent lower in the subsection primarily involved herein (R. 57–58).[5] In its opinion, the court below (Judge Madden dissenting) rejected petitioner's contention that the reduction in dredging yardage caused by the hurricane constituted a changed condition within the meaning of Article 4 of the contract (R. 58–62) and held that the United States was only bound herein to make an equitable adjustment under Article 4 of the contract and paragraph 4–01 of the specifications in the event that the contractor encountered materials, structures, or obstacles of a substantially different character from those de-

---

purport to reflect petitioner's actual costs but merely to show "that had the actual yardage and the time required for its removal been known when the bid was submitted, a higher bid, 35.73 cents per cubic yard, would have been submitted" (R. 57). As shown by its finding that the record did not establish an increase in petitioner's unit cost by reason of the hurricane tides (R. 58), the court below did not find, as implied by petitioner, that petitioner's evidence justified an increase in unit price of 1.73 cents per cubic yard (Pet. 8).

[5] The greatest variation between estimated and actual monthly dredging production on this project took place in the subsection least affected by the hurricane (R. 58).

scribed in the contract (R. 60–61). Accordingly, the court below dismissed the petition (R. 58).

ARGUMENT

1. Petitioner, in the Court of Claims, alleged that the "failure and refusal of the defendant's representatives to modify the contract price constituted a breach of the aforesaid covenant [Article 4] which resulted in damage to plaintiff" (R. 5) and that "plaintiff makes claim herein for that sum [$39,565.60] as actual damages or increased costs caused by the Government's failure to perform its part of the contract as set forth in the covenant in Article 4 thereof" (R. 6). Petitioner does not challenge, and is bound by, the finding of the court below (R. 58) that the record failed satisfactorily to establish that any material effect on its unit costs or monthly progress resulted from the reduction in yardage here in issue. *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 205–206. Thus petitioner failed to establish the damages or increased costs which it alleged. Irrespective of the question of breach, therefore, the judgment of the court below was fully justified by petitioner's inability to prove damage and is sustainable on that ground alone. *Nortz* v. *United States,* 294 U. S. 317, 327; *Marion & Rye Valley Railway Company* v. *United States,* 270 U. S. 280, 282; cf. *United States* v. *Smith,* 94

U. S. 214, 218–219; *United States* v. *Wyckoff Pipe & Creosoting Company, Inc.*, 271 U. S. 263, 267.

2. Petitioner, ignoring the finding discussed above[9] and referring generally to the importance of standard Government contract provisions, requests an "authoritative determination of the meaning and application" of Article 4 (Pet. 10). Even assuming that the facts of this case present a question of the interpretation of Article 4 which this Court, in appropriate circumstances, might review, we submit that the decision below is correct. The petition herein necessarily rests upon the contention that a reduction in quantity of the yardage to be dredged constituted a changed condition within the meaning of Article 4 of the contract and paragraph 4–01 of the contract specifications.[10] Neither the facts of the instant case nor the language of Article 4 support this contention.

At each stage of the transactions here involved, the Government took precautionary measures to avoid making warranties or binding representa-

[9] It should be noted that the dissenting judge below also ignored the finding and based his opinion on the assumption, contrary to the record, that petitioner was in a "financial plight" as a result of the reduction in yardage (R. 63).

[10] In its initial request for price revision in accordance with the administrative procedure of the contract, petitioner referred to paragraph 4–01 of the specifications as the basis for the change (R. 51), apparently urging that the scouring of easily dredgeable material constituted a change in the "character of materials" as contemplated by its provisions (R. 50, 54). This argument is not urged in the instant application for review.

tions as to the amount of material to be dredged. Its quantity figures were specifically labelled estimates and the duty of completing the project without regard to such estimates was cast upon petitioner by a clear provision of the specifications. The possibility of reduction in quantity by reason of tide scouring was brought to petitioner's attention both in the invitation to bid and in the contract. Obviously, the Government did not undertake responsibility for quantity in letting this unit price dredging contract. Conversely, the Government, by paragraph 4–01 of the specifications, did bind itself to make price adjustments under Article 4 if, in the opinion of the contracting officer, a change in the character of materials was encountered. On this basis, petitioner bid for and obtained the contract. The court below gave proper effect to these provisions and held the Government free of obligation to revise petitioner's contract unit price solely by reason of reduction in the quantity of material to be dredged, a result in accord with the "* * * intention of the parties to this contract that payment was to be made on a yardage basis * * *" for the quantity of material actually removed. *Tacoma Dredging Co.* v. *United States,* 52 C. Cls. 447, 452.

Finally, the language of Article 4 does not support petitioner's contention. As the court below appropriately observed (R. 61):

> The subsurface or latent conditions materially differing from those shown or indicated in the contract, referred to and contemplated by the first part of art. 4, were subsurface or hidden conditions which actually existed but were unknown by either party at the time the specifications and drawings were prepared and at the time the bid was submitted and accepted, and because of which unknown conditions the representation or indication in the plans and specifications would have to be substantially varied or changed in order for defendant to obtain the completed work as called for and intended by the contract.

Although petitioner relied (Pet. 9) upon the first classification of changed conditions in Article 4 in its petition in the Court of Claims (R. 4), it here also urges that it falls within the second classification of "unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications." But, insofar as the loss of material was caused by scouring, it was a condition well known to both parties and, insofar as the hurricane was the efficient cause, it was an act of God against which the contract did not protect. *Arundel Corporation* v. *United States*, 96 C. Cls. 77, 115–116. Cf. *Tacoma Dredging Company* v. *United States, supra.*

CONCLUSION

The decision below turns on the particular facts of this case. No question of importance is presented and there is no conflict. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,
Acting Solicitor General.
JOHN F. SONNETT,
Acting Head, Claims Division.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
SAMUEL D. SLADE,
Attorneys.

SEPTEMBER 1945.

APPENDIX

CONTRACT

(R. 7–18)

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for an increase or decrease of cost and/or difference in time resulting from such conditions.

* * * * *

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within

30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

SPECIFICATIONS

(R. 18–40)

1–04. Quantity of Material: The total estimated quantities of material necessary to be removed from within the specified limits, exclusive of allowable overdepth, to complete the work described in paragraph 1–02 are as follows:

Location	Cubic yards scow measurements
Section A—Sta. 110+00 to Sta. 375+00 (North Side)	2,423,000
Section B—Sta. 110+00 to Sta. 375+00 (South Side)	1,543,700
Total, Sections A and B	3,966,700

These amounts, plus 100 percent of the maximum quantity of estimated allowable overdepth, will be used as a basis for canvassing bids and for determining the amount of the consideration of the contract. (See paragraph on performance bond in invitation for bids.)

The maximum amount of allowable overdepth dredging is estimated to be as follows:

Location	Cubic yards scow measurements
Section A—Sta. 110+00 to Sta. 375+00 (North Side)	471,500
Section B—Sta. 110+00 to Sta. 375+00 (South Side)	387,800
Total, Sections A and B	859,300

Within the limit of available funds, the contractor will be required to excavate the entire quantity of material necessary to complete the work

specified in paragraph 1–02 hereof, be it more or less than the amounts above estimated.

* * * * *

1–08. Physical Data: * * *

* * * * *

Owing to the rapid currents, the material in the dredged cuts is eroded when it is disturbed by the process of dredging. During the progress of recent contracts the prescribed cuts have been secured by the contractor after the dredging of about 75% of the estimated quantity of material in the cut, scow measurement, including overdepth. The quantities of materials given in the specifications are the estimated pay yardages and are 75% of the actual quantities, scow measurement, lying between the present depth and side slopes and the final depth and side slope limits, including overdepth, of the work provided for in these specifications.

* * * * *

4–01. Character of Materials: * * *

The United States does not guarantee that other materials will not be encountered nor that the proportions of the several materials will not vary from those indicated by the explorations. Bidders are expected to examine the site of the work and the records of previous dredging operations which are available at U. S. Engineer Office, Boston, Mass., or U. S. Engineer Sub-Office, Buzzards Bay, Mass., and after investigation, decide for themselves the character of the materials and make their bids accordingly. * * *

If materials, structures, or obstacles of a substantially different character are encountered in the execution of the prescribed work and the cost of their removal or satisfactory treatment obviously would be, in the opinion of the contracting officer, either in excess of, or less than the contract price, the contracting officer, in either alternative, will then proceed in accordance with the provisions of article 4 of the contract.

U. S. GOVERNMENT PRINTING OFFICE: 1949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 297.

THE ARUNDEL CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

On Petition for Writ of Certiorari to the Court of Claims.

PETITION FOR REHEARING.

WILLIAM S. HAMMERS,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 297.

THE ARUNDEL CORPORATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

On Petition for Writ of Certiorari to the Court of Claims.

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the above named petitioner, The Arundel Corporation, by William S. Hammers, its counsel, and presents this, its petition for a rehearing of the above entitled proceeding and, in support thereof, respectfully submits, as a basis for the action requested, the following:

This case involves the meaning and application of the terms of a widely used standard form of Government con-

struction contract as applied to an underwater dredging project, and presents questions of substantial importance that have not been, but should be, settled by this Court.

The particular provision involved herein is Article 4, which prescribes a procedure for adjusting the contract price should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications. (R. 9)

The Court has in at least two instances, namely, *United States* v. *Callahan Walker Construction Co.*, 317 U. S. 56, and *United States* v. *Rice*, 317 U. S. 61, granted certiorari to review decisions of the Court of Claims involving the meaning and application of various articles of this standard form of contract. In each of those instances the United States was the petitioner, but it is believed that the Court should be animated by a justice as anxious to consider the rights of the contractor as those of the Government.

In *United States* v. *Rice*, supra, involving articles 3 and 4 of this standard form of government contract, the scope of the provisions was stated as follows:

> Article 3, entitled "Changes," governs the procedure under which the government may alter the specifications of the contract for general causes. Article 4, entitled "Changed Conditions," governs the procedure under which the government may alter the contract to meet unanticipated physical conditions.
>
> * * * *
>
> Both clauses deal with changes made necessary by new plans or new discoveries made subsequent to the signing of the contract.

The issue in this suit emanates from the discovery, made subsequent to the signing of the contract, of a substantial

change in the physical conditions from those shown on the drawings and represented in the specifications; and the basis of the action is the failure and refusal of respondent to modify the terms of the contract to provide for the increase of cost resulting from such changed conditions, pursuant to the covenant in Article 4 of the contract.

The contract between petitioner and respondent was for dredging to a depth of 32 feet below mean low water an area 100 feet wide and 26,500 feet long in the Cape Cod Canal, Mass. (R. 19, 43)

The area to be dredged had been surveyed by respondent's engineers about June 1938 (R. 47) and drawings prepared therefrom showing the work to be done, which drawings were listed in, and made a part of, the specifications, and later of the contract. (R. 7, 19) On the basis of the surveys the quantity of material to be dredged was determined and set out in the specifications and the invitation for bids. (R. 20, 47-48) The form of bid set out that the "quantity for canvassing bids" for the area involved was 2,894,500 cubic yards, scow measurement. (R. 42) The quantity of material was the essence of the contract. It was beyond question the principal physical condition involved.

During the progress of the work under the contract, subsurface conditions materially differing from those shown on the drawings or indicated in the specifications were encountered, investigated, and found to exist. (R. 49) From new surveys made in October and November 1938, after the contract had been signed, it was determined that the quantity of material to be dredged was 2,468,550 cubic yards instead of 2,894,500 cubic yards as had been represented, a reduction of 425,950 cubic yards. (R. 49)

The situation is, therefore, the same as that involved in the case of *Hollerbach* v. *United States*, 233 U. S. 165, the only difference being that in that instance the representation made related to the quality or character of material to be encountered and in this instance related to the

quantity. In the *Hollerbach case*, the Court said, at page 172:

> We think this positive statement of the specifications must be taken as true and binding upon the government and that upon it, rather than upon the claimants, must fall the loss resulting from such mistaken representations. We think it would be going too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the government as a basis of the contract left in no doubt. If the government wished to leave the matter open to the independent investigation of the claimants, it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity.

While it is an established fact that the subsurface conditions encountered by petitioner in the performance of its contract differed materially from those shown on the drawings or indicated in the specifications, respondent seeks to escape liability for the increase of cost resulting from such conditions on the ground that they were brought about by an act of God occurring after the contract was entered into, and in that respect has been upheld by the Court of Claims. (R. 49, 61) In the opinion, the Court of Claims says that "It is a general principle of law that neither party to a contract is responsible to the other for damages through a loss occasioned as a result of an act of God, unless such an obligation is expressly assumed," and contrued Article 4 as applying only to "conditions which actually existed but were unknown by either party at the time the specifications and drawings were prepared and at the time the bid was submitted and accepted."

An examination of the covenant in article 4 of the contract will show, however, that it contains no reservations or exceptions. It merely provides that if, during the

progress of the work, the conditions described therein are encountered by the contractor, or discovered by the Government, the contract will be modified to provide for any increase of cost resulting from such conditions.

In *Standard Life Co.* v. *McHutty,* 157 Fed. 224, it was said by the court, and the language used seems particularly appropriate here, that "The natural, obvious meaning of the provisions of a contract should be preferred to any curious hidden sense, which nothing but the exigencies of a hard case and the ingenuity of a trained and acute intellect could discover."

The courts have held that where a contract is prepared in one of the Government departments, leaving the contractor no choice as to form or phraseology, it must, where the wording gives rise to doubt, be construed against the Government and favorably to the contractor. *Noonan* v. *Bradley,* 9 Wall. 394; *Mouler* v. *American Life Ins. Co.,* 111 U. S. 335; *Chambers* v. *United States,* 24 C. Cls. 387; *Otis* v. *United States,* 20 C. Cls., affirmed in 120 U. S. 115; *Moore* v. *United States,* 196 U. S. 157.

This standard form of Government construction contract was prepared by respondent, with no choice given to petitioner as to form or phraseology. Article 4 thereof is a provision in the interest of both the Government and the contractor. It is important, therefore, to the Government as well as to the petitioner and others interested in government contract work that the questions of law involved, and set out in the petition for the writ, be authoritatively decided by this Honorable Court.

The general principle of law is that where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered unless such contingencies have been guarded against by a provision in the agreement. The natural, obvious, and generally understood, meaning and purpose of Article 4 is that it provides such protection.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the writ requested be issued.

Respectfully submitted,

WILLIAM S. HAMMERS,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I, William S. Hammers, counsel for the above-named petitioner, The Arundel Corporation, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WILLIAM S. HAMMERS,
Counsel for Petitioner.